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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 1579 162

HARVEY RAY HATCHER,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above entitled case on April 1, 1970.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, as yet unreported, appears at Appendix A, infra p.p. A-1-A-8 .

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 1, 1970. Petitioner's motion for rehearing was denied on April 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether error was committed in the United States District Court for the Northern District of Texas, in not severing Count I and Count II of the indictment under which Petitioner was tried, for the reason that some two and one-half (2½) years had elapsed between the alleged commission of an offense in Count I of the indictment and the commission of the offense in Count II of the indictment; and the jury probably cumulated evidence against Petitioner, and Petitioner was denied effectively, the right to testify on one count if he so desired, or remain silent if he so desired.

2. Whether error was committed in the United States District Court in allowing as evidence testimony from an informer concerning other alleged counterfeit coins, specifically nickels, when Petitioner was on trial for counterfeiting 1931-S pennies, which coins (nickels) were never admitted in evidence, and were never proved to have been counterfeit.

3. Whether the United States District Court erred in permitting the United States Attorney to cross-examine the Defendant, over objection, on matters not referred to on direct examination, including inquiry concerning alleged counterfeit nickels, which Appellant was not on trial for, and continually referred to the silence of Petitioner as to the source of counterfeit coins prior to the trial.

STATEMENT OF FACTS

The Petitioner, Harvey Ray Hatcher, was arrested at Dallas, Texas on August 8, 1967, upon a complaint initiated by United States Treasury Department Secret Service Agents, charging Petitioner with violation of Title 18, U.S.C. Sections 472 and

...uttering counterfeit obligations and securities of the United States." Petitioner was subsequently indicted on March 21, 1968 by a Federal Grand Jury in the Northern District of Texas on two (2) counts of violation of Title 18 U.S.C. Section 486.

Count One charged Petitioner, "unlawfully, wilfully and knowingly did on or about the 15th day of February, 1965 at Dallas, Texas, utter and pass to Oscar Utay," a metal coin in the resemblance of a 1916-D ten cent coin of the U.S.

Count Two charges Petitioner on or about July 27, 1967, at Dallas, Texas, "did unlawfully, wilfully and knowingly utter," to Nathan Shay forty-eight (48) metal coins in the resemblance of 1931-S one cent coins of the United States.

The indictment under Count I concerned the pawning by Petitioner on February 15, 1965 of a 1916-D dime to the pawnbroker, Oscar Utay, wherein Petitioner signed a pawn receipt, received $250.00 in cash, and thereafter made one recorded interest payment of $25.00 on the loan. Subsequently, some two and one-half (2½) years later, agents from the Secret Service retrieved the coin from Oscar Utay and determined that it was a counterfeit coin.

The indictment under Count II concerned Petitioner giving the informer Nathan Shay 48 1931-S one cent coins to sell in Dallas on or about July 27, 1967. The informer testified, on direct examination of 10 rolls of 1939-D nickels the Petitioner had given him, that he took them to various coin shops in Dallas to sell and later returned them to Petitioner. There was no evidence concerning the genuineness of the 1939-D nickels being counterfeit, other than an attempt by the informer to inject the word "counterfeit" into testimony based on hearsay evidence. The testimony concerning the 1939-D nickels was seasonably objected to by counsel by a Motion in Limine, overruled by the Court. The

only other testimony giving any indication the 1939-D nickels were counterfeit was testimony offered by a Secret Service Agent concerning a telephone conversation he monitored between Petitioner and the informer, which conflicted in some respects with the testimony of the informer. Further, although the informer testified concerning other alleged counterfeit coins, no proof was ever introduced indicating other denominations of counterfeit coins were made or uttered by the Petitioner.

After Petitioner finished testifying on direct examination, the United States Attorney questioned Petitioner on cross-examination concerning things that were never brought out on direct examination. Petitioner was questioned about conversations allegedly held between Petitioner and the informer wherein Petitioner told him he could get identification in Louisiana, should think up a good story if he were arrested, and questioned Petitioner concerning his silence as to where he received these coins from the time of his arrest until the time of trial.

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted Because The Petitioner Was Tried In The U.S. District Court On A Two Count Indictment, For Two Separate Offenses, Which Offenses Were Separated In Time By Some Two And One-Half Years.

Petitioner urges failure to sever and try him separately on Count I and Count II deprived him of his right to due process of law and a fair and impartial trial as guaranteed by the 14th Amendment to the Constitution. It is urged that Rule 14, F.R.C.P. specifically provides for relief from prejudicial joinder, and if it appears a defendant may be prejudiced by a joinder of offenses, the Counts should be severed and the cases tried separately. Common sense dictates the United States Attorney for the Northern District

of Texas would never have indicted, much less tried, Petitioner under Count I.

The act of pawning a rare coin (1916-D dime), receiving $250.00 in cash, signing his correct name on the pawn ticket and subsequently paying $25.00 interest on the pawned item, hardly constitutes sufficient evidence to indict and try Petitioner for counterfeiting. However, by indicting Petitioner also under Count II, the government does indirectly that which is generally forbidden, cumulating evidence before the jury to seek conviction. In Drew v. U.S. (1964) 331 F. 2d 85, the Court of Appeals for the District of Columbia reversed the conviction of Drew for robbery and attempted robbery, the Court of Appeals quoting from Judge Hand in U.S. v. Latch, 102 F. 2d 35., spells out the objection to the use of multiple count indictments, and the tendency of a jury to cumulate evidence. The jury was undecided as to Count I of this indictment, 9 for acquittal, 3 for conviction, and contrary to the argument advanced that the jury was able to distinguish the facts in Count I from Count II, wherein Petitioner was convicted, it is urged that obviously 3 could not distinguish, and perhaps the evidence as to Count II was cumulated by the 9 who voted for acquittal.

It is urged the Court of Appeals for the District of Columbia and the Fifth Circuit Court of Appeals have different standards as to what constitutes cumulating evidence, and as to whether separate offenses, separated by a long period of time, should be tried together.

It is submitted these points are of great public importance, and it was wrongly decided below.

II. The Writ Should Be Granted Because Evidence That The Accused Has Committed Another Crime, Independent Of The One For Which He Was On Trial, Was Used To Convict Petitioner.

The rule is well laid in 2 Wigmore S. 317 at p. 217, that if in fact other related counterfeiting is admissible, its falsity must be shown. Were, in fact, the 1939-D nickels given to the informer by Petitioner counterfeit? The record fails to reflect any evidence as to their being in fact counterfeit. Time and again counterfeit 1939-D nickels were alluded to during the trial of this matter without counterfeit 1939-D nickels ever being placed in evidence.

III. The Writ Should Be Granted Because The United States Attorney Was Not Limited On Cross-Examination To The Matters Brought Out On Direct Examination, And Continually Referred To The Silence Of Petitioner From The Time Of His Arrest Until The Trial Of The Case, Thereby Prejudicing Petitioner In His Right To Remain Silent, If He So Desired.

The decision of the Fifth Circuit in this matter, allowing a broad spectrum of cross-examination, renders the present rule limiting cross-examination obsolete. This Court, since the time of Justice Story, Philadelphia & T. R. Co. v. Stimpson, 14 Pet. 448, 461, 10 L. Ed. 535, and the Courts of Appeals Bell v. U.S., 185 F. 2d 302, and Echert v. U.S. 188 F. 2d 336 have consistently upheld the federal rule on cross-examination. Petitioner urges that if the time has come to enlarge the federal rule, then this Court should so enlarge it. If the Court considers the rule adequate, as it has for over 100 years, then it is respectfully felt the Fifth Circuit should be so advised.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28021

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HARVEY RAY HATCHER,

Defendant-Appellant.

Appeal from the United States District Court for the

Northern District of Texas

(April 1, 1970)

Before WISDOM, GOLDBERG, and INGRAHAM,

Circuit Judges.

INGRAHAM, Circuit Judge: Harvey Ray Hatcher, Defendant-Appellant, was tried in the Northern District of Texas and appeals his jury conviction for unlawfully, willfully and knowingly uttering metal coins in the resemblance of coins of the United States, in violation of Title 18 U.S.C. § 486.

Appellant was indicted on March 21, 1968 by a federal grand jury in the Northern District of Texas on two counts of violation of Title 18, U.S.C. § 486.[1] In essence, count one charged the appellant with passing a counterfeit 1916-D ten cent coin to Oscar Utay, a pawn broker, in Dallas, Texas on or about February 15, 1965. Count two charged the appellant with passing 48 counterfeit 1931-S one cent coins to Nathan Shay in Dallas, Texas on or about July 27, 1967.

Prior to trial, the defendant moved for severance and separate trial of the two counts which, after argument and hearing was denied.

With regard to count 1, the evidence indicates that the defendant, on February 15, 1965 pawned a 1916-D ten cent coin at the shop of Oscar Utay. At the time Mr. Utay received the coin, represented by the defendant as genuine, he sent it to another coin dealer in the Dallas area, one more knowledgeable than he in appraising rare coins, to determine its genuineness. Mr. Utay received word from the dealer that the coin appeared genuine, whereupon he loaned to the defendant $250.

A chemist for the Bureau of the Mint, qualified as an expert witness, testified that in his opinion, the dime in question was counterfeit. The defendant took the stand in his own behalf and admitted that this transaction took place but denied that he knew the coin was counterfeit at the time it was pawned.

Regarding the second count of the indictment, the testimony elicited at trial revealed the following facts. The

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1 Whoever, except as authorized by law, makes or utters or passes, or attempts to utter or pass, any coins of gold or silver or other metal, or alloys of metals, intended for use as current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

defendant and Mr. Shay first became acquainted in Houston when Mr. Shay was the owner of the Rio coin shop. Although the coin shop, as it existed at that time, is subject of coins was discussed. This meeting apparently took place sometime in 1962, after which, Mr. Shay moved to Dallas where he has continued to reside. In 1967, the defendant and Mr. Shay met by chance outside a coin shop in Dallas. Recognizing one another from the earlier Houston meeting, they began discussing the subject of coins. The defendant told Mr. Shay that he had some 1950 and 1939 D nickels that he wanted to sell and wanted to know if Mr. Shay could move (sell) a large amount of coins.

A few days later, the defendant called Mr. Shay and requested that they meet at a local restaurant. At this meeting, the defendant gave Mr. Shay a roll of 1931 S pennies to sell. The defendant also asked Mr. Shay if he could sell a 1939 D nickel. When Mr. Shay asked if the nickels were stolen, the defendant replied, "You don't have to worry about it, they belong to me. I have been collecting them for a long time." Although Mr. Shay did not receive any nickels on this occasion, he did receive ten rolls of 1939 D nickels from the defendant at a later meeting. After unsuccessful attempts to sell the nickels to local coin dealers, Mr. Shay returned the nickels to the defendant, telling him that he (Mr. Shay) had been told that the nickels were counterfeit. The defendant said that he wasn't sure whether they were counterfeit or not.

Mr. Shay's attempts to sell the nickels to local coin dealers had brought to the attention of the Secret Service. When Mr. Shay learned that the Secret Service was looking for him, he contacted them and related his activities. As a consequence,

[illegible] called Mr. Shaffer's apartment several days [illegible] Secret Service agent listened to the conversation on an [illegible]. The defendant in response to a question from Mr. Shaffer as to whether the pennies were bad, stated, "Those coins are not counterfeit....You don't have to worry about those coins, there is no trace on them."

On further testimony, the expert witness from the Bureau of the Mint, expressed the opinion that the 1931 S cent coins were also counterfeit.

Taking the stand in his own behalf, the defendant, on direct examination, testified to facts concerning both counts one and two of the indictment. Again, as in count one, his defense was that he did not know the coins in question were counterfeit. In conducting cross examination, counsel for the government went into both counts one and two as well as the facts surrounding the defendant's possession of the 1950 and 1939 D nickels.

The jury, after deliberation, was unable to reach a verdict on count one but found the defendant guilty as charged on count two.

The defendant asserts in his first point of error that the trial court's denial of his motion to sever and the failure to try the two counts separately prejudiced his right to a fair and impartial trial. The government contends that joinder was proper under rule 8 (a), Fed. R. Crim. P., and that such joinder was not prejudicial.

It seems clear that joinder was proper under rule 8(a) Fed. R. Crim. P.[2] and the only question remaining is whether such

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2. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transaction connected together or constituting parts of a common scheme or plan.

joinder was prejudicial to the defendant in this case. While it is true that both the [illegible] elapsed between the alleged commission of the offenses in the indictment, this, in itself, is insufficient to show prejudice.

The defendant relied heavily on the case of Drew v. United States, 331 F. 2d 85 (D.C. Cir. 1964) to support his contention that failure to sever was prejudicial. The court in Drew delineated three circumstances in which the criminal defendant may be prejudiced: (1) the defendant may be embarrassed or confounded in preparing separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

Under the first circumstance, there is nothing to indicate that the defendant was embarrassed or confounded in preparing his defenses. His defense to both counts in the indictment was his lack of knowledge that the coins were, in fact, counterfeit.

The defendant's contentions under (2) above are wholly without merit. The verdict of the jury finding the defendant guilty of count two and the jury's inability to reach a verdict on count one make it obvious that the evidence of guilt as to count two was not used by the jury to carry over or infer a criminal disposition or guilt with respect to count one, upon which the jury was unable to agree.

The third argument of the defendant, that the jury cumulated the evidence, is likewise without merit. The evidence as to each offense was separate and distinctly presented by government counsel and the trial judge admonished and instructed the jury

No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1979

HARVEY RAY HATCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 162

HARVEY RAY HATCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 423 F. 2d 1086.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1970. A petition for rehearing was denied

on April 16, 1970. On May 15, 1970 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to grant petitioner's request for a severance.

2. Whether evidence concerning other alleged counterfeit coins which were not the subject of the two count indictment should have been excluded.

STATEMENT

An indictment filed on March 21, 1968 in the United States District Court for the Northern District of Texas charged petitioner with uttering a counterfeit 1916-D ten cent coin on February 5, 1965 (Count I), and with uttering 48 counterfeit 1931-S one cent coins in July 1967 (Count II), both offenses in violation of 18 U.S.C. 486. After a jury trial, petitioner was convicted on Count II. The jury was unable to reach a verdict on Count I. Petitioner was sentenced on June 4, 1969 to imprisonment for 18 months. The Court of Appeals affirmed (Pet. App. 1-8).

The evidence relating to Count I showed that on February 5, 1965, petitioner pawned a 1916-D ten cent coin for $250 at a shop owned by one Oscar Utay (Tr. 73-75). Mr. Utay testified that petitioner had represented that the coin was genuine (Tr. 74-75). As a safeguard, Mr. Utay had sent the coin to another coin dealer for examination, who had also concluded

that the coin appeared to be genuine (Tr. 75). An expert witness from the Bureau of the Mint testified that in his opinion the dime was counterfeit (Tr. 192-193).

The evidence relating to Count II was primarily elicited from Nathan Shay who first met petitioner in Houston in 1962 when Shay worked for the ABC Coin Shop (Tr. 96, 99). At that time, petitioner, a salesman for certain meat products, was negotiating a sale with Shay and the subject of coins was discussed only incidentally (Tr. 99).

In 1967, petitioner and Shay met accidentally outside a coin shop in Dallas (Tr. 99-100). After informing Shay that he owned several coins which he wanted to sell, petitioner suggested that Shay might be interested in selling some 1950 and 1939-D nickels for him (Tr. 100, 102-103). Subsequently, petitioner contacted Shay and asked him to meet him at a local restaurant to discuss further possible coin transactions (Tr. 103). At the meeting, petitioner gave Shay a roll of 1931-S pennies which he wanted sold for $800 and also asked Shay if he could sell rolls of 1939-D nickels (Tr. 104-105). The following day, petitioner gave Shay 10 rolls of 1939-D nickels to sell (Tr. 109-110), telling him that they belonged to someone in his family (Tr. 111). Shay was unsuccessful in his attempt to sell the nickels to various coin dealers (Tr. 112-115).

Shortly thereafter, Shay learned that agents of the Secret Service wanted to see him. Upon contacting them, he was told that the nickels he had been trying to sell were counterfeit. Shay agreed to continue his

dealings with petitioner and to report his activities to the agents (Tr. 124, 126, 135). On instructions from the agents, Shay returned the nickels to petitioner stating that he had been told that they were counterfeit (Tr. 116-117). Petitioner replied that he was uncertain as to the genuineness of the nickels (Tr. 117).

Shay did not return the pennies, but continued to make efforts to sell them (Tr. 119-121, 140). During this period, petitioner and Shay engaged in several telephone conversations regarding the pennies, during which petitioner admitted that the pennies were not genuine (Tr. 149-164); he disclosed that the pennies and nickels were made in Germany. Petitioner also asserted that he needed money so that he could go to Mexico to procure more coins (Tr. 121-124).

With Shay's permission, Gary L. Wistrand, a Secret Service agent, listened in on a telephone conversation on August 1, 1967 between petitioner and Shay, during which he heard petitioner start to say the word "counterfeit", pause and resume with "1931-S pennies" (Tr. 172-174). At a later date, Shay paid petitioner $800 for the pennies with money supplied from the Secret Service (Tr. 127).

An expert witness from the Bureau of the Mint expressed the opinion that the 1931-S pennies were counterfeit (Tr. 187-190).

ARGUMENT

1. The trial court acted within its discretion in refusing to grant petitioner's request for a severance

of trial on the two counts of the indictment. The charges were of a similar nature and thus within the joinder provisions of Rule 8(a), F.R.Cr.P and no prejudice accrued warranting relief under Rule 14, F.R.Cr.P. The opinion of the court of appeals discusses and properly rejects the claim of prejudicial joinder and we rely upon that discussion here (Pet. App. 4-7).

2. Petitioner also argues that testimony, elicited from Shay and petitioner himself, concerning the 1939-D nickels which were not covered by the two-count indictment, should have been excluded. As the transactions involving the alleged counterfeit nickels were inextricably tied to the transfer of the counterfeit pennies, testimony concerning the nickels was properly admitted on the issues of intent and knowledge. See *e.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; *United States* v. *Chapman*, 413 F. 2d 440 (C.A. 5), certiorari denied, 396 U.S. 903; *United States* v. *Cobb*, 397 F. 2d 416 (C.A. 7), certiorari denied, 393 U.S. 924; *United States* v. *Knohl*, 379 F. 2d 427 (C.A. 2), certiorari denied, 389 U.S. 973. Moreover, the trial judge protected petitioner's interests by carefully charging the jury on the limited purpose for which the evidence regarding the nickels was admitted (Tr. 239-240). There is no reason to suppose that the jury failed to follow these instructions. See *Frazier* v. *Cupp*, 394 U.S. 731, 735-736.[1]

[1] Petitioner's further claim that government counsel in cross-examination prejudiced him by "continually" referring to his silence from the time of arrest to the time of trial

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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JULY 1970.

(Pet. 6) is without merit. An examination of the cross-examination reveals that government counsel was not commenting on petitioner's right of silence but seeking to test his claim made on direct examination that petitioner did not know that the pennies were counterfeit (Tr. 222-223). No objection regarding this line of cross-examination was made at trial nor was any clarifying instruction sought. Moreover, no issue in this connection was raised in the court of appeals. There is no reason for this Court to consider this newly raised issue at this juncture.

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